CHIA SEE YIN & ORS

v.

YEOH KOOI IMM

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: 24-915-1995]
12 JANUARY 1996

LAND LAW: *Sale and purchase of land - Purchaser/defendant exceeding prescribed period for completion - Seller/plaintiffs refusing extension of time - Seller applying to remove private caveat lodged by purchaser - Purchaser agreeing to withdraw private caveat - Purchaser entering second caveat on same grounds as first caveat - Application for removal - Principles applicable - Whether defendant had caveatable interest - Whether condition that time was of the essence had been waived by plaintiffs - Whether proper notice required to terminate agreement and forfeit deposit - Whether second caveat valid and proper*

The plaintiffs agreed to sell a part of their land to the defendant and for that purpose had entered into a sale and purchase agreement dated 6 January 1995. The defendant failed to pay the balance purchase price by the completion date and sought an extension of time for the payment of the balance purchase price. The plaintiffs refused to grant the extension of time sought and the defendant entered a caveat on the whole land.

The plaintiffs applied for the removal of the caveat but before the hearing of the plaintiffs' application the defendant withdrew the caveat. The defendant then proceeded to file a second caveat on the same grounds as the first caveat and brought proceedings for specific performance of the agreement.

The plaintiffs applied to remove the second caveat.

Held:

[1] Since the plaintiffs were the registered proprietors of the land, the onus of proof that the caveat should remain was on the defendant caveator. At the time the second caveat was lodged the defendant had no caveatable interest in the land as the agreement which formed the basis of the defendant's claim had been lawfully terminated by the plaintiffs due to non-payment of the balance purchase price by the due date.

[2] In the present case time remained the essence of the contract from begining to end. Throughout, the plaintiffs had conducted themselves in such a manner as to indicate that they meant to make time the essence of the agreement. There was no evidence to support the defendant's allegation that time had been extended by the negotiations between the 3rd plaintiff and the defendant's agent. In the circumstances time was never waived and remained active throughout the whole episode.

[3] There was no requirement in the agreement for notice to terminate the agreement. Nevertheless the notice dated 21 June 1995 issued to the defendant's solicitor was a valid and proper notice and in the circumstances the plaintiffs were entitled to treat the agreement as null and void and forfeit the deposit.

[4] Since the defendant had no caveatable interest at the time she lodged the second caveat, the entry of the second caveat amounted to an abuse of the caveat procedure and must in the circumstances be disallowed.

[Plaintiffs' application allowed with costs; caveat ordered to be removed.]

Cases referred to:

Damodaran v. Vasudevan [1974] 1 MLJ 128 ***(affd)***
Eastham v. Leigh London and Provincial Properties Ltd [1971] 1 Ch 871 ***(refd)***
Hiap Yiak Trading Sdn Bhd & Ors v. Hong Soon Seng Sdn Bhd [1990] 1 CLJ 912 ***(refd)***
Hock Hin Bros Sdn Bhd v. Low Yat Holdings Sdn Bhd [1984] 1 MLJ 92 ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 1 MLJ 719 ***(refd)***
Murugappa Chettiar Lakshmanan v. Lee Teck Mook [1995] 2 CLJ 545 ***(foll)***
National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 MLJ 211 ***(refd)***
Paramount Limestone v. Nader Minerals [1979] 1 MLJ 90 ***(refd)***
Property and Bloodstock Ltd v. Emerton [1967] 2 All ER 839 ***(cit)***
Sim Chio Huat v. Wong Ted Fui [1983] 1 MLJ 151 ***(refd)***
Stocks & Holdings (Imperial Arcade) Ltd v. Fink [1965] 82 WN (Pt 1) (NSW) 386 ***(refd)***
Thevathason v. Kwong Joon [1990] 2 CLJ 308 ***(refd)***
Trans Trust SPLR v. Danubian Trading Co Ltd [1952] 2 QB 297 ***(refd)***
Webb v. Hughes [1870] LR 10 Eq 281 ***(dist)***
Wijeyesekera v. Festing [1919] AIR 155 PC ***(dist)***
Wong Kuan Tan v. Gambut Development Sdn Bhd [1984] 2 MLJ 113 ***(foll)***
Wong Kup Sing v. Jeram Rubber Estate Ltd [1969] 1 MLJ 245 ***(refd)***

Legislation referred to:

Land Acquisition Act 1960, s. 8(1), (3),
National Land Code 1965, ss. 326(2), (3), 327, 327(1), 328, 329(2)

Other source referred to:
Contracts General Principles, Chitty, vol 1, 25th edn, para 752

For the plaintiffs - AG Danaraj; M/s Gana Muthusamy & Co
For the defendant - Hong Chin Heng; M/s Gulam & Wong

Reported by Satish Nair

JUDGMENT

Abdul Malik Ishak J:

This was an application by the plaintiffs in encl. 3 for the following prayers:

(1) that the private caveat lodged by the defendant on September 21, 1995 *vide* Presentation Number 1953/95, Jilid 17, Folio 191 on the land known as EMR 1405, Lot 1948 in the Mukim of Plentong, Johor ("land") be removed;

(2) damages for the wrongful entry of the caveat to be assessed by the Senior Assistant Registrar;

(3) an interlocutory injunction to restrain the defendant from entering any further caveats;

(4) any further order or relief as the court may deem fit and proper; and

(5) costs to be borne by the defendant and payable to the plaintiffs.

The facts garnered from the affidavits filed by the parties thereto can be stated thus.

The plaintiffs are the registered proprietors of the land measuring 8 acres 1 rood 09 poles. By an agreement dated 6 January 1995, the plaintiffs agreed to sell a portion of the land measuring three acres, delineated in the plan annexed to the agreement, at RM718,000. Certain terms were expressed in the agreement and these included:

(a) that the sum of RM71,800 paid by the defendant shall be construed as a deposit and as part payment towards the purchase price.

(b) that the completion date shall be three months from the date of the agreement with a provision for extension of time by a further period of one month with interest at the rate of 10% per annum on the balance of the purchase price.

(c) that the defendant will undertake to secure the issuance of the new individual titles categorised under industry in accordance with the plan annexed thereto on or before October 31, 1995 at her own costs and expense together with the other expenses incidental thereto (as reflected in clause 2 of the special conditions to the agreement).

(d) in the event the defendant failed to secure the issuance of new individual titles to the land, the plaintiffs shall be entitled to forfeit a sum equivalent to 15% of the purchase price absolutely and thereafter the agreement shall be terminated and be of no effect (this appears in clause 3 of the special conditions to the agreement).

(e) the defendant will agree to reimburse the plaintiffs for the defendant's portion of premiums paid to the land office by payment of a D & C cheque no: 006407 dated December 23, 1994 for RM56,250.00 in favour of M/s Lee Chai Eng, Haris & Co., as stakeholder to be paid to the plaintiffs, in the event the said cheque was dishonoured upon presentation the plaintiffs shall be entitled to forfeit the 10% purchase price absolutely and terminate the agreement (clause 4 of the special conditions).

(f) that "time wherever mentioned shall be of the essence of this Agreement" (clause 15 of the agreement).

Looking at the agreement, it is the duty of this court to determine whether the conditions as enumerated above affect the formation of the contract of sale of three acres out of the whole portion of the land so as to render the contract conditional or whether it is merely a term of the contract (see the approaches adopted by Ungoed-Thomas J, in *Property and Bloodstock Ltd v. Emerton* [1967] 2 All ER 839 and that of Danckwerts LJ, in the Court of Appeal [1968] 1 Ch 94, at 112 and 118). Buckley LJ, in *Eastham v. Leigh London and Provincial Properties Ltd* [1971] 1 Ch 871 distinguished these two types of conditions as:

> That is not, in my judgment, a condition precedent to the contract at all, its part of the terms of the contract. You may call it a condition if you please, but it does not make it a condition precedent to the existence of a contract, it merely indicates what is part of the terms of the bargain, just as in all contracts for sale the terms of the bargain are customarily described as conditions of sale.

Denning LJ, in *Trans Trust SPLR v. Danubian Trading Co. Ltd* [1952] 2 QB 297 on the same subject matter put it rather well and this was what his Lordship said:

> Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation 'subject to the opening of a credit' is rather like a stipulation 'subject to contract'. If no credit is provided, there is no contract between the parties. In other cases a contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of a contract, but to the obligation of the seller to deliver the goods. If the

> buyer fails to provide the credit, the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit.

Back home in Malaysia, Salleh Abas CJ (Malaya) (as he then was) in the then Federal Court case of *National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 MLJ 211, differentiated these two types of conditions in the following terms:

> A contingent condition, as we have already referred it, is a provision in a contract to the effect that the contract shall not take effect unless and until the condition is fulfilled, and the non-fulfilment of the condition does not render either party liable in damages to the other; whilst a promissory condition, on the other hand, is an essential term of the contract, the breach of which entitles the innocent party to break itself as discharged from the contract and to sue for damages.

In my view, on the authorities, it is a correct statement of the law to say that a condition which affects the formation of a contract of sale, as in a conditional contract is therefore referred to as a contingent condition whereas one which relates to the performance of a term of a contract is described as a promissory condition (Chitty on *Contracts General Principles*, vol. 1, 25th Edn., at para. 752). Clearly, therefore, the conditions attached to the agreement in the present case are contingent conditions and, I, so hold accordingly. Reverting back to the mainstream of the case, the facts will now be continued and be stated thus.

Since the agreement was dated 6 January 1995, the completion date (on the basis of three months' calculation from the date of the agreement) falls on 5 April 1995. But on 18 April 1995, the defendant sought an extension of time purportedly on the grounds that the subject property would be acquired by the Drainage and Irrigation Department ("D.I.D"). Through Messrs R.K. Menon & Co., the defendant sought to show by letter addressed to Messrs Lee Chai Eng & Co. dated 18 April 1995 at paras. 5 and 6 thereof that:

> It has now transpired that the Drainage and Irrigation Department Johor, wishes to acquire a part of the land concerned to accomodate the existing stream that flows within the said parcel of land.
>
> Our client (the defendant) does not, at this point in time know the exact area that the D.I.D. wishes to acquire. For that matter, the area acquired might or might not be substantial. Our client has in fact been told of the intended acquisition by a very Senior Officer in D.I.D. i.e. one Mr. Bala and in the circumstances, our client is in the process of negotiating with the D.I.D. the exact area that is to be acquired. To date this has not been finalised.

On 21 June 1995 the plaintiffs' solicitors took the necessary steps and:

(a) rejected the defendant's request for an extension of the date of completion beyond 5 May 1995.

(b) notified the defendant to the effect that the alleged intended acquisition by the D.I.D. was outside the purview of the Land Acquisition Act, 1960.

(c) gave notice that as a result of the breach of the essential term of the agreement, the sum of RM71,800.00 was forfeited.

(d) refunded the sum of RM56,250.00 being the contribution made by the defendant in regard to the premiums imposed by the land office.

On 3 July 1995, the defendant lodged a private caveat against the whole portion of the land ("first caveat") and this prompted the plaintiffs to file an originating summons number 24-661-1995 to have the first caveat removed. On 12 September 1995, approximately two weeks before the hearing of the Originating Summons number 24-661-1995, the defendant's solicitors informed the plaintiffs' solicitors that the defendant will be withdrawing the first caveat. This piece of startling information made the plaintiffs to withdraw the originating summons number 24-661-1995 which was, in due course, done subject to the defendant paying the necessary costs.

On 21 September 1995, the defendant filed another caveat ("second caveat") on the land on precisely the same grounds as the first caveat. The defendant also took a drastic measure by filing a civil suit in the Johor Bahru High Court *vide* Civil Suit No: 22-197-1995 for specific performance of the agreement. It was the defendant's contention that sometime on 20 April 1995 her agent personally met the third plaintiff to discuss the issue of the intended acquisition by the D.I.D. and to seek the consent of the third plaintiff who was allegedly acting on behalf of himself and the other plaintiffs for an extension of the completion date. It was also the defendant's contention that the third plaintiff on behalf of himself and the other plaintiffs agreed to the extension. The plaintiffs vehemently denied these contentions. While the third plaintiff admitted that the defendant's agent met him in his office on 20 April 1995, yet the third plaintiff denied that he agreed to grant any extension of time although requested for by the defendant's agent. It is germane to mention here that the defendant's agent is an undischarged bankrupt by the name of Chua Lai Seng with an exceedingly huge liability to the tune exceeding RM5,000,000 and the Official Assignee confirmed that he cannot be traced. In the course of the submission it transpired that Chua Lai Seng was an Advocate and Solicitor who has the misfortune of being struck off the roll and he is currently said to be in Johor Bahru.

I now propose to discuss the several issues that have cropped up in the present case.

Has The Defendant A Caveatable Interest?

Since the plaintiffs are the registered proprietors of the land, the onus of proof that the caveat should remain lies on the defendant caveator. In this regard, reference may be made to the case of *Wong Kuan Tan v. Gambut Development Sdn Bhd* [1984] 2 MLJ 113 FC, where Hashim Yeop Sani FJ (as he then was) in explaining the nature of the onus said:

> If an applicant is the registered proprietor of the land he need only show that he is the registered proprietor. His registered title is prima facie evidence of his unfettered right to deal with the land as he pleases. It is then for the caveator to satisfy the court that there are sufficient grounds in fact and in law for the caveat to be extended. The caveator must satisfy the court that on the evidence presented his claim to an interest in the land raises a serious question to be tried and having done so he must go to show that on the balance of convenience it would be better to maintain the status quo until the trial of the main action.

His Lordship Hashim Yeop Sani FCJ (as he then was) proceeded further to say that:

> To put it more simply, the caveator in this case must satisfy the court that he has a 'caveatable interest' in the land. Only if he has such an interest can he qualify to lodge a caveat under s. 323 of the National Land Code.

Recently the Court of Appeal in *Murugappa Chettiar Lakshmanan v. Lee Teck Mook* [1995] 2 CLJ 545; [1995] 1 MLJ 782; adopted the principles as enunciated in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 1 MLJ 719 in an application for removal of caveat under s. 327(1) of the National Land Code 1965 ('NLC'). G Sri Ram JCA delivering the judgment of the Court of Appeal in *Murugappa Chettiar Lakshmanan (supra)* had this to say:

> First, whether the respondent, on the material set out by him in his application under s. 323 (1) of the Code, has disclosed a caveatable interest. Secondly, if he has established a caveatable interest, then, whether the evidence he produced before the learned judicial commissioner in support of his claim to that caveatable interest discloses a serious question to be tried. Lastly, if the first two questions are resolved in the respondent's favour, then, whether the balance of convenience, or more appropriately, the balance of justice, lies in favour of the caveat remaining on the register pending the disposal of his suit.

In another part of his judgment, his Lordship G Sri Ram JCA said:

> Until and unless a purchaser has an enforceable contract for the sale of land, he can lay no claim to the title to registered land. A *fortiori,* he has no interest that is capable of protection by the entry of a caveat. As we have said, the application for the entry of the caveat in the instant case contains no assertion of a concluded contract.

It is my judgment that when the second caveat was lodged on 21 September 1995, the defendant has no caveatable interest on the land for the following salient reasons:

(a) the agreement which formed the basis of the defendant's claim or registrable interest in the land was not valid or subsisting at the time of the lodgement of the second caveat because the agreement had been lawfully terminated by the plaintiffs on 21 June 1995 when the balance of the purchase price had not been paid by 5 May 1995 (the extended completion date).

(b) the defendant has not fulfilled her obligations by 5 May 1995 or at any time thereafter. The defendant seems unwilling to perform her side of the contract and desires to make a substantial modification so as to amount to a new contract. The defendant seems to blame the D.I.D. for the intended acquisition of the land but surprisingly in encl. 6 of exh. "YKI 3" the purported acquisition was entirely based on the letter dated 18 May 1995 by one Balasingam. For convenience, that letter is reproduced hereinunder:

JABATAN PENGAIRAN DAN SALIRAN NEGERI JOHOR
ARAS 3, BANGUNAN SULTAN IBRAHIM,
KARUNG BERKUNCI 712,
80990 JOHOR BAHRU

Ruj. Tuan : LSS 10/93/3
Ruj.Kami : JPSJ 203/1/3(71)(13)

Tarikh : 18 Mei 1995

Tetuan Jurukur Berlesen,
Lee Swee Siang,
27A, Jalan Kuning Satu, Taman Pelangi,
80400 Johor Bahru.

PERMOHONAN PECAH SEMPADAN TANAH LOT 1948 EMR 1405 MUKIM PLENTONG KERANA PERUSAHAAN OLEH ENCIK CHIA SEE YIN & RAKAN-RAKAN

Berhubung dengan perkara di atas, setelah lawatan tapak serta semakan dibuat, simpanan JPS selebar 20 meter (1 rantai) hendaklah diuntukkan dari tebing cabang Sungai Tiram yang mengalir melalui lot tersebut. Sila kemukakan pelan permohonan baru yang telah diuntukan simpanan JPS tersebut.

"BERKHIDMAT UNTUK NEGARA"

(Sgd)
(IR BALASINGAM A/L CK VELU)
b/p Pengarah Pengairan dan Saliran Negeri
Johor

BV/mss

sk. Pentadbir Tanah Johor Bahru.
Ruj. (4)dlm. (PT) 2/95.

It is a sad observation to make that the name of Mr. Bala as adverted to by Messrs R.K. Menon & Co., in the letter dated 18 April 1995 is none other than IR. Balasingam a/l CK Velu, the writer of the abovementioned letter. It must be noted that Mr. Bala had revealed the intended acquisition to the defendant as adverted to by Messrs R.K. Menon & Co., even on 18 April 1995. If it is true as alleged by Messrs R.K. Menon & Co., this state of affairs should stop. Government officers must be tight-lipped about Government matters. Be that as it may, two initial observations must be made in regard to this letter. Firstly, it was not addressed to the plaintiffs or to the defendant; instead it was addressed to the third party. Secondly, it was not a declaration in the prescribed form published in the gazette as required under the provisions of the Land Acquisition Act 1960. In fact no gazette in regard to the purported acquisition of the land was ever exhibited by the defendant. In the absence of the declaration in Form D as envisaged in s. 8(3) of the Land Acquisition Act 1960, the conclusive evidence clause that the decision of the state authority that the land is needed for the purpose specified in s. 8(1) thereof being final, conclusive and cannot be questioned is thus found wanting and missing here. In the circumstances, the decision of the Privy Council in *Wijeyesekera v. Festing* [1919] AIR 155 PC cannot be applied to the facts of the present case.

(c) it was argued that since the agreement gave the defendent the right to lodge the second caveat, that agreement becomes the catalyst that would give the defendant a caveatable interest to the land. However, when the agreement was terminated on 21 June 1995, the defendant had no leg to

stand onto and, consequently, she had no registrable interest to the land to enable her to lodge the second caveat on the land. As Chang Min Tat FJ (as he then was) said in *Paramount Limestone v. Nader Minerals* [1979] 1 MLJ 90 especially at p. 92:

> On the evidence before me, the right of the respondents sprang from the agreement of 9 October 1975, which had not been extended. Even if it had not been determined effectively by valid notice on 1 March 1976, it had now been determined by effluxion of time. The respondents can have no title or registrable interest to the land under such an expired agreement.

(d) reverting back to the question of the purported acquisition of the land, if indeed there was such an eventuality as the defendant sought to say, then the agreement would come to an end. This is clearly spelt out in cl. 16 of the agreement.

Whether Time, As The Essence Of The Agreement, Has Been Waived By The Plaintiffs?

This is indeed an important and pivotal issue to the whole case. For fear of repetition it was sought to argue that the third plaintiff had, on 20 April 1995, consented to the defendant's agent's request for an extension of the date of completion on behalf of himself as well as the other plaintiffs. The defendant further contended that as a result of that consent, time as the essence of the agreement had been waived. One must not lose sight of the fact that all the plaintiffs held the land as co-proprietors. There was no evidence at all to show that the third plaintiff was appointed as the spokeman for the other two co-proprietors of the land. Even assuming that the third plaintiff did give his consent on his own behalf as well as on behalf of the other co-proprietors, such consent has no force of law to bind the other co-proprietors of the land. Now, for the sake of argument, even assuming that there was such a discussion between the third plaintiff and the defendant's agent for an extension of the date of completion, at best such a discussion was made in the course of negotiating towards a contract collateral to the agreement. One must not forget that negotiations for a contract, no matter how advanced, cannot amount to a contract.

There are three situations wherein time can be said to be the essence of the contract:

(a) Where the contract expressly stipulates that time shall be the essence of the contract. This basic statement of the law can be distilled from the following cases: *Steedman v. Drinkle* [1916] 1 AC 275; *Brickles v. Snell* [1916] 2 AC 599; *Mussen v. Van Diemen's Land Co* [1938] Ch 253 and *Harold Wood Brick Co. Ltd v. Ferris* [1935] 2 KB 198.

(b) Where time was not incorporated as the essence of the contract but in due course it has been made as part and parcel of the contract by one party giving a notice to the other. That notice can only be given after the party has been guilty of unreasonable delay and it follows, as the night the day, that the time mentioned in the notice must be reasonable: *Green v. Sevin* [1879] 13 Ch D 589; *Compton v. Bagley* [1892] 1 Ch 313; *Stickney v. Keeble* [1915] AC 386; *Smith v. Hamilton* [1951] Ch 174 and *Re Barr's Contract* [1956] Ch 551. Authorities show that what is reasonable is a question of fact, and like the case of *Ajit v. Sammy* [1967] 1 AC 255 six days may be said to be reasonable.

(c) Where from the nature of the contract, time may be said to be the essence of the contract. Examples of these kind of contracts are abound. By way of examples reference may be made to mercantile contracts (*Reuter v. Sala* [1879] 4 CPD 239 at 249), contracts for the sale of leaseholds (*Hudson v. Temple* [1860] 29 Beav. 536 at 543), an option to buy shares which fluctuate in value (*Hare v. Nicoll* [1966] 2 QB 130), a colliery business (*Macbryde v. Weekes* [1856] 22 Beav 533) and a public house as a going concern (*Lock v. Bell* [1931] 1 Ch 35).

The question to ask is this: Whether the conduct of the third plaintiff in meeting the defendant's agent as stated earlier would amount, in law, as a waiver that time should no longer be the essence of the contract? The facts in the present case are unlike that of *Wong Kup Sing v. Jeram Rubber Estate Ltd* [1969] 1 MLJ 245 where Raja Azlan Shah J (as His Majesty then was) held that "once time for completion was allowed to pass and parties went on negotiating time was no longer of the essence of the contract ... ." It is my judgment that time, in the present case, remains the essence of the contract from the beginning to the end. If the allegation by the defendant was indeed true that time had been extended by the negotiations between the third plaintiff and the defendant's agent, why then did the plaintiffs reject the defendant's request for an extension of the date of completion beyond 5 May 1995! Why then did the plaintiffs give notice that as a result of the breach of the essential term of the agreement, the sum of RM71,800 was forfeited! Throughout, the plaintiffs conducted themselves in such a manner as to indicate to the world at large that they meant to make time the essence of the agreement. It is also my judgment that time was never waived and remained active throughout the whole episode. The present case is unlike that of *Webb v. Hughes* [1870] LR 10 Eq 281, 286 where Sir R. Malins V.C. observed:

> But if time be made of the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract. But, on the other hand, it must be borne in mind that a purchaser is not bound to wait an indefinite time; and if he finds, while the negotiations are going on, that a long time will elapse before the contract can be completed, he may in a reasonable manner give notice to the vendor and fix a period at which the business is to be terminated.

See also the observations of Salleh Abas FJ (as he then was) in *Sim Chio Huat v. Wong Ted Fui* [1983] 1 MLJ 151, 153 FC.

Whether Proper Notice Is Required To Terminate The Agreement And Forfeit The Sum Of RM71,800?

Clause 12 of the agreement is worded in this fashion:

> In the event of the purchaser (referring to the defendant) failing, refusing and/or neglecting to pay the balance (of the) purchase price on the date of completion a sum equivalent to ten per centum (10%) of the purchase price shall be forfeited by the vendor (referring to the plaintiffs) forthwith without any further notice and balance of the moneys received by the vendor (referring to the plaintiffs) shall be refunded to the purchaser (referring to the defendant) forthwith without interest whereupon this agreement shall be treated as null and void and of no further effect and neither party shall have any claim whatsoever against the other.

On 5 May 1995, the defendant failed to pay the balance of the purchase price to the plaintiffs and when the plaintiffs forthwith forfeited RM71,800 being ten per centum of the purchase price after issuing a notice dated 21 June 1995 to the defendant's solicitor, that notice though not a requirement under cl. 12 of the agreement must in my judgment be considered a proper and valid notice and it is also my judgment that when the plaintiffs returned RM56,250.00 to the defendant being the defendant's contribution for the land conversion premiums without interest in the same letter dated 21 June 1995, the plaintiffs had complied with that part of the requirement of cl. 12 of the agreement.

Consequently, the plaintiffs were entitled to treat and they did treat the agreement as null and void.

Whether The Second Caveat Is Valid And Proper?

The Registrar of Titles under s. 329(2) of the NLC shall not entertain any application for the entry of a further caveat in respect of the same land in three circumstances:

(a) where the court has ordered the removal of an earlier private caveat under s. 327 of the NLC; or

(b) where the court has refused an application under s. 326(2) of the NLC for an extension of time with respect to such a caveat; or

(c) where the Registrar of Titles has removed the earlier private caveat pursuant to s. 326(3) of the NLC.

All the authorities show that the three circumstances as enumerated above are not exhaustive and the courts have held that second caveats to be good in law and should be allowed to continue until the disposal of the main suit, on the one hand, and the courts too have held to the contrary that where the entry of the second caveats were made *mala fides* it would be struck down as being an abuse of the caveat procedure.

In *Damodaran v. Vasudevan* [1974] 1 MLJ 128, Syed Agil Barakbah J (as he then was) said:

> The provisions of s. 329 (2) require scrutiny. It disallows the registrar to entertain any application for the entry of a further caveat if it is based on the like claim as that on which the former was based in cases where the court has ordered the removal of the former or has turned down an application for extension of time. The subsection may be construed as to enable another caveat to be entered provided it is based on different grounds from the former and after the former caveat has ceased to exist. In other words, it is not a renewal, revival or continuance of the former; it speaks of an entirely separate caveat distinct from the other. In the light of the above, and construing the relevant provisions of the Code as a whole as regards the subject, the only natural and logical construction that can be given by way of analogy is that they do not envisage the issue of a caveat when one is still in existence and the more so, on the same grounds. To construe otherwise will contravene the real intention of Parliament and tend to oust the jurisdiction and power of the court under section 326 which arise in this case. If the law is allowed to be circumvented by recognising the second caveat the result will undoubtedly be an overlapping of caveats on the same land, on the same ground and by the same caveator.

Damodaran's case *(supra)* seems to follow the Australian trend as envisaged in *Stocks & Holdings (Imperial Arcade) Ltd v. Fink* [1965] 82 WN (Pt. 1) (NSW) 386, where the Australian Courts would intervene by way of an injunction in cases where the caveat procedure was abused by the entry of not only vexatious but successive caveats which cannot be sustained.

In *Hiap Yiak Trading Sdn Bhd & Ors v. Hong Soon Seng Sdn Bhd* [1990] 2 MLJ 155, Richard Talalla JC (as he then was) followed the decision of Edgar Joseph Jr J (now FCJ) in *Hock Hin Bros Sdn Bhd v. Low Yat Holdings Sdn*

Bhd [1984] 1 MLJ 92, and held, in dismissing the appeal, that the caveat ought to remain as the defendants had succeeded in showing that their claim to the land raised a serious question to be tried. It was further held that the fact that the defendants had entered an earlier caveat which they subsequently withdrew voluntarily did not prevent them from entering a second caveat.

In *Thevathason v. Kwong Joon* [1990] 3 MLJ 49, LC Vohrah J (as he then was) said:

> I did not think that both these authorities (*KI Muhiudeen Rawther v. KEP Abdul Kassim & Ors* [1959] MLJ 257 and *Lim Kiat May v. Hamzah* [1966] 2 MLJ 175) which were cited in *Damodaran v. Vasudeva* to support the proposition that a second caveat may not be entered at the instance of the same applicant in respect of the same land and on precisely the same grounds under the National Land Code in any way prohibited the entering of a fresh caveat even after the lapse of the first caveat based on a different ground or even on the same grounds if it is for the *bona fide* purpose of protecting the caveator's interest in respect of the same land.

It is germane to mention that there is no provision in the NLC for the caveator to obtain an extension of his private caveat beyond the original statutory period of six years specified in s. 328 of the NLC. Accordingly, to ensure continued protection of his claim to an unregistered registrable interest in the land, the caveator will normally enter a second caveat. But here on the facts, the first caveat was removed voluntarily by the defendant barely two months after it was lodged and this was followed by the second caveat which was lodged on the same grounds as the first caveat. Since I have held that the defendant has no caveatable interest at the time she lodged the second caveat for the reasons set out in the early part of this judgment, it is my considered view that the second caveat amounts to an abuse of the caveat procedure and this court must, in the circumstances, disallow its entry.

For the reasons adumbrated above, I allowed prayers (1), (2), (3) and (5) of encl. 3.